Tekali Prospecting Sdn Bhd v Tenaga Nasional Bhd & Anor

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R2–25–19 OF 2001
FAIZA TAMBY CHIK J
26 JULY 2001

Public Authorities *— Statutory body — Powers of — Entry into private land for installation and construction of posts and towers — Notice of intention to enter land requiring removal of buildings, whether ultra vires s 11 — Whether ss 11 and 16 allowed for compulsory acquisition or use of land — Objection to notice — Electricity Supply Act 1990 ss 11 & 16 — Federal Constitution art 13(2)*

Words and Phrases *— 'other equipment' — Electricity Supply Act 1990 ss 2 & 11*

On 23 December 2000, the first respondent issued a notice to enter a private land belonging to the applicant. The notice was served on 12 January 2001 on the applicant. The notice was said to be issued pursuant to s 11 of the Electricity Supply Act 1990 ('the Act') which permits for the purpose of installing system of distribution of energy entry into private land by the first respondent as a licensee appointed under the Act in order to lay, place or carry of post or other equipment as may be necessary or proper for the purposes of the licensed installation, as the case may be, and may take such other action as may be necessary to render the installation safe. The notice required the applicant to remove all buildings and keep clear 7.064 acres of land and stated that the first respondent proposed to construct posts (tiang) or towers (menara). The applicant sought an order to remove the notice, for the notice to be quashed or alternatively a declaration that the notice was invalid, null and void. The applicant was also seeking a stay of all proceedings pursuant to the notice. The respondents contended that the first respondent had correctly proceeded under s 11 of the Act. They also contended that there was provision under the Act to deal with objection and to provide compensation. The applicant contended that s 11 of the Act was not intended for a situation such as the present one.

Held, allowing the application:

(1) On a proper interpretation of art 13(2) of the Federal Constitution, the provisions of ss 11 and 16 of the Act were not intended to cover compulsory acquisition or use of land. The provisions are only intended for the purpose of entry into private land to erect post and provisions for payment of compensation for such specified incursion. It is not intended for the construction of towers, removal of buildings 66ft either side of the transmission lines or any such serious large scale and occupation of private land and for the deprivation of property rights of land owners to such an extent. Use of land in perpetuity cannot be considered to

attract rent at market value payable. Lease are not given in perpetuity. The provision requiring 'annual payment' cannot be equated with adequate compensation as is required by art 13(2) of the Federal Constitution (see pp 121D–E, 133B–C). A

(2) The first respondent's choice of the s 11 procedure was also irrational. If the first respondent had acted fairly and reasonably, it would not have put the applicant to the trouble and inconvenience of going through the machinations of the s 11 procedure in order to finally try and persuade the state authority that acquisition of the land should be made instead of entry pursuant to s 11. It was for the first respondent to act fairly by commencing right away under the Land Acquisition Act 1960 and it should be for the first respondent to persuade the state authority that the applicant's land should be acquired for the use by the first respondent of the 7.064 acres (see p 122E, G–H). B C

(3) The words 'other equipment' following the word 'posts' in s 11 of the Act cannot be construed to mean large steel structures called 'menara' or 'towers'. The interpretation of the word 'equipment' in s 2 of the Act specifies such items by way of illustration as machines, transformers, apparatus, measuring instruments, protective devices, wiring materials, accessories and appliances. This meaning cannot by any stretch of the imagination to be extended to refer to 'towers' or 'menara' as an alternative to posts (see p 123C–D). D E

(4) The first respondent had proceeded under the wrong provision of the law. On a proper interpretation of the words of s 11 of the Act, the s 11 notice issued on 23 December 2000 was at variance with the words of the section. The s 11 notice issued by the first respondent on 23 December 2000 was thus ultra vires s 11 of the Act because the notice made demand and required things to be done which were not specifically and clearly provided in s 11 of the Act. The objects of the first respondent could have been lawfully achieved by proceeding instead under s 19 of the Land Acquisition Act 1960 which provides entry into land in urgent cases for land to be used for public purposes (see pp 124A, I, 131G–H, 133E). F G

(5) By reason of the government's privatization of certain public services aiming to improve efficiency and profitability in the public interest, the first respondent could not act in an irresponsible manner. Their action affect the members of the public and the rights and interests of diverse private citizens. Hence the proper exercise of the first respondent's statutory powers was subject to judicial review. The s 11 notice is a notice issued pursuant to a statutory power. The objection that an order of certiorari could not be issued against the first respondent because it was not a public authority was without substance. In addition, the appeals procedure under ss 11(7) and 26(2) of the Act is not a bar to judicial review if an arguable case is made out H I

A that a public body has acted ultra vires and unfairly and had abused its powers. The first respondent performed public functions and had to exercise its discretion by acting judicially (see pp 127C–D, 128H–I, 129B).

B **[Bahasa Malaysia summary**

Pada 23 Disember 2000, responden pertama telah mengeluarkan satu notis untuk memasuki sebidang tanah persendirian milik pemohon. Notis tersebut telah disampaikan pada 21 Januari 2001 ke atas pemohon. Notis tersebut dikatakan telah dikeluarkan menurut s 11
C Akta Bekalan Elektrik 1990 ('Akta tersebut') yang membenarkan, bagi tujuan pemasangan sistem pengagihan tenaga, kemasukan ke tanah persendirian oleh responden pertama sebagai pemegang lesen yang dilantik di bawah Akta tersebut bagi tujuan meletak atau mengangkat tiang atau peralatan lain yang perlu atau betul untuk tujuan pemasangan berlesen, sebagai mana keadaan memerlukan, dan
D boleh mengambil apa-apa tindakan lain yang mungkin perlu untuk melaksanakan pemasangan yang selamat. Notis tersebut menghendaki pemohon meruntuhkan semua bangunan dan melapangkan 7.064 ekar tanah dan menyatakan bahawa responden pertama telah bercadang untuk membina tiang-tiang dan menara-menara. Pemohon
E memohon satu perintah untuk membatalkan notis tersebut atau secara alternatifnya satu deklarasi bahawa notis tersebut adalah tidak sah dan batal. Pemohon juga memohon satu penggantungan semua prosiding menurut notis tersebut. Responden-responden menegaskan bahawa responden pertama adalah betul dengan menggunakan s 11 Akta tersebut. Mereka juga menegaskan bahawa terdapat satu
F peruntukan di bawah Akta tersebut tentang bantahan dan yang memperuntukkan pampasan. Pemohon menegaskan bahawa s 11 Akta tersebut tidak bertujuan untuk keadaan seperti dalam kes ini.

Diputuskan, membenarkan permohonan tersebut:

G (1) Berhubung penafsiran yang betul terhadap perkara 13(2) Perlembagaan Persekutuan ('Perlembagaan'), peruntukan-peruntukan ss 11 dan 16 Akta tersebut tidak bertujuan untuk meliputi pengambilan atau penggunaan tanah secara paksa. Peruntukan-peruntukan tersebut hanya bertujuan untuk kemasukan ke tanah persendirian untuk menaikkan tiang dan
H peruntukan-peruntukan untuk pembayaran pampasan untuk kemasukan sebegini yang mendadak. Ia tidak bertujuan untuk pembinaan menara-menara, meruntuhkan bangunan-bangunan 66 kaki di kedua-dua belah garisan pemindahan atau apa-apa skala yang besar sepertinya dan apa-apa penempatan atas tanah persendirian dan untuk menjejas apa-apa hak hartanah ke atas
I pemilik-pemilik tanah pada tahap tertentu. Penggunaan tanah untuk selama-lamanya tidak boleh dianggap menggalakkan sewa pada nilai yang dibayar di pasaran. Pajakan tidak diberikan untuk

selama-lamanya. Peruntukan tersebut yang menghendaki 'bayaran tahunan' tidak boleh disamakan dengan pampasan yang mencukupi sebagai mana yang dikehendaki oleh perkara 13(2) Perlembagaan (lihat ms 121D–E, 133B–C).

(2) Pilihan responden pertama terhadap prosedur s 11 juga tidak rasional. Jika responden pertama telah bertindak dengan adil dan munasabah, ia tidak mungkin meletakkan pemohon dalam keadaan yang payah dan susah melalui prosedur s 11 untuk akhirnya cuba dan meyakinkan pihak berkuasa negeri bahawa suatu pengambilan tanah tersebut sepatutnya dibuat dan bukan suatu kemasukan menurut s 11. Adalah untuk responden pertama bertindak dengan adil dengan memulakan dengan segera di bawah Akta Pengambilan Tanah 1960 dan responden pertamalah yang sepatutnya meyakinkan pihak berkuasa negeri bahawa tanah pemohon sepatutnya diperolehi untuk penggunaan oleh responden pertama ke atas 7.064 ekar tersebut (lihat ms 122E, G–H).

(3) Perkataan-perkataan 'other equipment' selepas perkataan 'posts' dalam s 11 Akta tersebut tidak boleh diberi makna struktur besi yang besar yang dipanggil 'menara' atau 'towers'. Tafsiran perkataan 'equipment' di dalam s 2 Akta tersebut memperuntukkan melalui illustrasi barang-barang sedemikian sebagai mesin-mesin, transformer-transformer, perkakas, alat pengukur, aksesori, and alat-alat. Tafsiran ini tidak dapat merujuk kepada 'towers' atau 'menara' sebagai ganti kepada tiang (lihat ms 123C–D).

(4) Responden pertama telah bermula di bawah peruntukan undang-undang yang salah. Dengan memberi tafsiran yang betul untuk perkataan-perkataan dalam s 11 Akta tersebut, notis s 11 yang dikeluarkan pada 23 December 2000 bercanggah dengan perkataan-perkataan di dalam seksyen tersebut. Oleh itu, notis s 11 yang dikeluarkan oleh responden pertama pada 23 Disember 2000 adalah ultra vires s 11 Akta tersebut kerana notis itu mendesak dan memerlukan sesuatu dibuat yang tidak diperuntukkan di dalam s 11 Akta tersebut. Matlamat responden pertama boleh dicapai dengan sah mengikut undang-undang dengan menggunakan s 19 Akta Pengambilan Tanah 1960 yang membenarkan kemasukan ke dalam hartanah di dalam kes-kes penting di mana tanah tersebut digunakan bagi kegunaan awam (lihat ms 124A, I, 131G–H, 133E).

(5) Oleh kerana kerajaan telah menswastakan perkhidmatan-perkhidmatan awam yang tertentu untuk meningkatkan kecekapan dan pencapaian keuntungan bagi kepentingan awam, responden pertama tidak boleh bertindak secara tidak bertanggungjawab. Tindakan mereka akan mempengaruhi orang-orang awam dan hak-hak dan kepentingan warganegara. Oleh itu, penggunaan kuasa undang-undang responden pertama yang betul

tertakluk kepada kajian semula kehakiman. Notis s 11 merupakan notis yang dikeluarkan menurut kuasa berkanun. Bantahan bahawa perintah certiorari tidak boleh dikeluarkan terhadap responden pertama kerana responden pertama bukan merupakan pihak berkuasa awam tidak kukuh. Selain daripada itu, prosedur rayuan di bawah ss 11(7) dan 26(2) Akta tersebut tidak menjadi halangan kepada kajian semula kehakiman jikalau terdapat kes yang boleh dihujahkan bahawa badan awam tersebut telah bertindak ultra vires dan secara tidak adil dan telah menyalahgunakan kuasanya. Responden pertama melaksanakan fungsi-fungsi perkhidmatan awam dan perlu menggunakan budibicaranya dengan bertindak secara adil (lihat ms 127C–D, 128H–I, 129B).]

Notes

For a case on the powers of a statutory body, see 10 *Mallal's Digest* (4th Ed, 1999 Reissue) para 1586.

Cases referred to

Ahmad Bashid bin Abdul Malek & Ors v Timbalan Menteri Dalam Negeri & Ors and other appeals [1999] 3 MLJ 369 (refd)

Bencon Development Sdn Bhd v Majlis Perbandaran Pulau Pinang & Ors [1999] 2 MLJ 385 (refd)

Dai-Ichi Electronics (M) Sdn Bhd v Tenaga Nasional Bhd [1996] 4 MLJ 50 (refd)

Datuk Bandar Kuala Lumpur v Zain Azahari bin Zainal Abidin [1997] 2 MLJ 17 (refd)

Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor [1979] 2 MLJ 101 (refd)

Dr Benjamin George & Ors v Majlis Perbandaran Ampang Jaya and other applications [1995] 3 MLJ 665 (refd)

Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors [1985] 2 MLJ 35 (refd)

Foster & Ors v British Gas plc [1991] 1 QB 405; [1991] 1 All ER 705 (refd)

Government of Malaysia & Anor v Jagdis Singh [1987] 2 MLJ 185 (refd)

Government of Malaysia & Anor v Selangor Pilot Association [1977] 1 MLJ 133 (refd)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481 (refd)

Hot Holding's Pty Ltd v Creasy & Ors (1996) 134 ALR 469 (refd)

Lai Cheng Cheong v Sowaratnam [1983] 2 MLJ 113 (refd)

Lim Kui Siam & Ors v Pentadbir Tanah, Daerah Kluang Originating Motion No 25–25 of 1994 (High Court, Muar) (refd)

Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1991] 3 MLJ 1 (refd)

Mercury Energy Ltd v Electricity Corp of New Zealand [1994] 1 WLR 521 (refd)
Methuen-Campbell v Walters [1979] 1 All ER 606 (refd)
Oriental Insurance Co Ltd & Anor v Minister of Finance [1992] 2 MLJ 776 (refd)
OSK & Partners Sdn Bhd v Tengku Noone Aziz & Anor [1983] 1 MLJ 179 (refd)
Petaling Tin Bhd v Lee Kian Chan & Ors [1994] 1 MLJ 657 (refd)
President, District Council, Batu Pahat v Lo Hong Tan [1983] 1 MLJ 299 (refd)
R v Electricity Commissioners, ex p London Electricity Joint Committee Co (1920) 1 KB 171 (refd)
R v London Borough of Hillingdo, ex p Royco Homes Ltd [1974] 1 All ER 643 (refd)
R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)
Robert John Reeves v Menteri Sumber Manusia Malaysia [2000] 1 MLJ 107 (refd)
Scales v Pickering (1828) 130 ER 840 (refd)
Secretary of State for Education & Science v Tameside Metropolitan Borough Council [1976] 3 All ER 769 (refd)
Tan Yook Tian (G) & Anor v The District Forest Officer, Rompin, Pahang & Ors [1987] 1 CLJ 73 (refd)
Tan Yeong Kim lwn Tenaga Nasional Bhd [2000] 4 AMR 4817 (refd)
Teh Cheng Poh v PP [1979] 1 MLJ 50 (refd)
Tenaga Nasional Bhd v Dolomite Industrial Park Sdn Bhd [2000] 2 MLJ 133 (refd)
United Malayan Banking Corp Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2) [1988] 3 MLJ 352 (refd)
Vengadasalam v Khor Soon Weng & Ors [1985] 2 MLJ 449 (refd)

Legislation referred to

Aboriginal Peoples Act 1954 s 11
Copyright Act 1969
Electricity Act 1949
Electricity Ordinance 1949 s 53
Electricity Supply Act 1990 ss 4, 9, 11(7), 13, 16, 24, 26(2)
Electricity Supply (Successor Company) Act 1990 s 3
Federal Constitution art 13(1), (2)
Forest Enactment (FMS 1934)
Industrial Relations Act 1967 s 20(2)
Interpretation Acts 1948 and 1967 s 17A
Judicature Amendment Act 1972 [NZ] s 4(1)
Land Acquisition Act 1960 ss 3(1)(b), 19
Rules of High Court 1980 O 53(1)
Street Drainage and Building Act 1974 s 83
Town and Country Planning Act 1976

A *A Kanesalingam* (*Kanesalingam & Co*) for the applicant.

Shahrul Hameed Amiruddin (*Khairuzzaman Muhammad* with him) (*Zul Rafique & Partners*) for the first respondent.

Mohd Asnawi Abu Hanipa (Selangor State Legal Adviser) for the second respondent.

B **Faiza Tamby Chik J**: On 23 December 2000, the first respondent, a statutory corporation, issued a notice to enter private land belonging to the applicant. This notice was served on 12 January 2001 on the applicant. The notice was said to be issued pursuant to s 11 of the Electricity Supply Act 1990 ('the Act') which permits for the purpose of installing a system of distribution of energy entry into private land by the first respondent as a C licensee appointed under the Act in order to lay, place or carry on posts or other equipment as may be necessary or proper for the purposes of the licensed installation, as the case may be, and may take such other action as may be necessary to render the installation safe. The notice required the applicant to remove all buildings and keep clear 7.064 acres of land, and stated that the first respondent proposed to construct posts (tiang) or towers D (menara). The applicant seeks an order to remove the notice to this court for the notice to be quashed or alternatively a declaration that the notice is invalid, null and void. The applicant is also seeking a stay of all proceedings pursuant to the said notice. The respondents contend that the first respondent has correctly proceeded under s 11 of the Act. They also E contend that there is provision in the Act to deal with objections and to provide compensation. The applicant contends that s 11 of the Act was not intended for a situation such as the present one.

The applicant is objecting to the issuance by the first respondent of the notice of intention to enter the applicant's land:

F (a) requiring the applicant to keep 7.064 acres of the applicant's land clear;

(b) to erect posts (tiang) or towers (menara) all along a specified route on the applicant's land; and

(c) requiring the applicant to remove buildings on the said 7.064 acres of G land.

This notice is said to be issued pursuant to s 11 of the Act. Under s 11 of the Act, if an objection is not lodged by the applicant with the land administrator within 14 days of service of the said s 11 notice, the first respondent can enter the applicant's land for the purpose stated and do all H of the acts stated in the notice. Section 11 of the Act provides for payment to the applicant landowner of full compensation for any 'disturbance, damage or disability that may be caused' by the acts done and also provides that such compensation shall include 'an annual payment for land sued for the purpose of the posts (tiang) or other equipment. Section 11 of the Act permits such a notice to be given for the 'purpose of installing any system of I distribution of energy under this Act', and 'a licensee may lay, place or carry on, under or over any land, other than state land, such posts (tiang) and other equipment as may be necessary or proper for the purposes of the

licensed installation, as the case may be, and may take such other action as may be necessary to render the installation safe and efficient ...'. Before entering the land, the licensee is required to give a notice stating as 'fully and accurately as possible the nature and extent of the acts intended to be done'. The first respondent is the 'licensee' under the Act. The s 11 notice does not state what the 'licensed installation' is that the acts intended to be done are in aid of, but it appears that the installation is the 'national grid' system. The first respondents set up a system of distributing and selling electricity to consumers all over Malaysia. Although there are currently no buildings on the land, the applicant has applied for planning permission with a view to developing their land into a low cost and medium cost housing estate.

It is noted that the following objections are taken to the s 11 notice issued by the first respondent. There is no provision for the laying of towers (menara) under s 11. The section only allows the laying of posts (tiang). The 'other equipment' that is also allowed must mean the ordinary incidental items affixed to such electricity posts. There is no provision in s 11 providing for payment of the market value of the land as envisaged by art 13(2) of the Federal Constitution ('the Constitution'), read together with the Land Acquisition Act 1960 ('the LAA'). The provision for payment of full compensation for any disturbance, damage or disability in s 11 of the Act is intended for the laying of posts (tiang) only. Section 16 of the Act provides for assessment of the compensation payable under s 11 of the Act. The proviso to s 16 of the Act prohibiting payment of compensation for trees cut in certain circumstances shows that the compensation payable under s 11 of the Act was intended when posts (tiang) are erected requiring trees to be chopped off to enable the wires to run unhindered. There is no equivalent provision for buildings required to be removed showing that removal of buildings were not anticipated. The s 11 notice was not intended to be given when high transmission lines supported by towers (menara) are run through private land requiring the landowner to vacate land measuring 132ft (two chains) wide amounting to 7.064 acres to be made available by the land owner for the purposes of the first respondent. There is no time limit set by the s 11 notice for the use of the land comprising the two chain strips (called rentis) amounting to 7.064 acres to be made available for the purpose of erecting the towers and laying the transmission lines. This must mean that the portion of land is required for use in perpetuity. Section 11 of the Act does not appear to envisage taking over 307,707.84 sq ft or (7.064 acres) of land in perpetuity. Section 11 of the Act provides that annual payment can be made payable for 'land used for the purpose of the posts or other equipment'. 'Annual payment' cannot refer to a rent payable at market value because rental value fluctuates. There is no provision for review of the annual payment from time to time. Further, the 'annual payment is only for the land used for the purpose of the posts or other equipment.' There is no provision for annual payment for land adjacent to the transmission lines upon which any buildings, if any, would have to be removed and which has to be kept clear for as long as the towers (menara) are there, ie in perpetuity.

A The s 11 notice dated 23 December 2000 issued by the first respondent requires 7.064 acres of land comprising a span of 66ft on either side of the transmission lines all along its route across the applicant's private land to be left vacant. What then is the respective legal rights of the land owner and the first respondent in respect of 7.064 acres of land? Does the so-called 'annual payment', if it was intended for the use of this land area make the first B respondent a tenant or lessee or owner or co-owner or user or licensee vis-a-vis the land owner, or does it give the first respondent any other legal status vis-a-vis the 7.064 acres? Who must, for instance, cut the grass? Who will pay for cutting the grass? Can the landowner enter the land and use it for any other purposes? What will be safe occupation and what will not be? C Who will pay for any claims for death or injury or property loss as a result of any unforeseen electrical activity emanating from the towers (menara) or transmission lines suffered by persons who sue the land for any other purpose other than building at the invitation or behest of the land owner? All these questions and consequential legal implications are not covered or contemplated in ss 11 and 16 of the Act on a proper reading thereof. I am D of the view that these are added reasons to state that the legislature never intended ss 11 and 16 of the Act to cover a situation in which a land owner is required to keep as vacant 66ft of land either side of power transmission lines running through private land and for the construction of large steel structures on such private land. Use of land in perpetuity cannot be E considered to attract rent at market value payable. Leases are not given in perpetuity. The provision requiring 'annual payment' cannot be equated with adequate compensation as is required by art 13(2) of the Constitution. The legislature, it appears, had in mind only 'posts' (tiang) being laid on the land, and whatever the laying of such 'posts' (tiang) when the similar provision was first introduced in 1949 in s 53 of the Electricity Ordinance F 1949. Presumably, 'towers' and 'pylons' and 'high tension wires' were not prevalent at that time. This section was obviously not intended to cover 'towers', 'pylons' or 'removal of buildings' or the land owner vacating land 66ft on either side of the equipment laid. The first respondent is using a re-enacted old provision of the law not intended for the work proposed to be now carried out in the year 2001. The Government has a controlling G interest in the first respondent. Any appeal from the decision of the land administrator made in respect of the objections to the s 11 notice or in respect of the assessment under s 11 must be made to the state authority. The decision of the state authority is stated to be final. The applicant fears that proceedings under s 11 deprive the applicant of valuable safeguards H such as the avenue of a reference to the High Court which is available to the land owner under the LAA. Towers (menara) are large steel structures which themselves occupy a fair amount of land area. In the light of the intention to erect towers (menara) and to occupy 7.064 acres of land effectively in perpetuity, I would have thought that the first respondent should have proceeded under s 3(1)(b) of the LAA. This section permits I land to be acquired for the purpose of corporation like the first respondent. Section 19 of the LAA allows entry into possession of land in urgent cases. The first respondent would have achieved its objective of getting its national

grid project moving expeditiously and the applicant would get its adequate compensation under art 13 of the Constitution under the LAA. It appears that the brunt of the first respondent's submission is that the applicant had a remedy in s 11(8) of the Act in that the state authority may in objection proceedings or on an appeal from a decision of the land administrator direct the acquisition of the land affected. The first respondent appears to say that if s 11 had been wrongly applied, but there is no harm done because this can be rectified on an appeal to the state authority. Alternatively, the first respondent or the land owner can leave it to the land administrator to allow or prohibit any of the acts mentioned in the s 11 notice. The requirements under s 11 notice and the acts proposed to be done are too great a departure from the activity prescribed under s 11(1) of the Act. Why should the land owner be subjected to such procedures? Why should not the first respondent read s 11 of the Act carefully and apply it correctly? Section 11 of the Act only applies for the installation of posts. The then Federal Court in *Lai Cheng Cheong v Sowaratnam* [1983] 2 MLJ 113 at p 115 adapted the following passage from SA de Smith's *Judicial Review of Administrative Action* (4th Ed) at p 423:

> The existence of a right of appeal to the courts from a tribunal's decision does not deprive the courts of power to award prohibition to restrain the tribunal from acting outside its jurisdiction. Nor is the applicant obliged to have exhausted prescribed administrative means of redress before having recourse to the courts.

The first respondent's choice of the s 11 procedure is also irrational. If it had applied the proper principles of law in the exercise of their choice of law, the first respondent as a statutory licensee exercising a statutory power should not have chosen an Act of Parliament that would put the applicant to trouble and inconvenience. The first respondent themselves should have considered the two statutory options open to them (in addition to the numerous non statutory options open to them, eg an outright negotiated purchase of the land in question or the making of a way leave agreement). The first respondent should then have asked themselves whether the acts intended to be taken by them properly came within the meaning of s 11, and whether it was a fair exercise of their discretion to proceed under s 11 when balancing the first respondent's need to set up the national grid in the public interest as against the private property rights of the land owner. I am of the view that if the first respondent had acted fairly and reasonably, it would not have put the applicant to the trouble and inconvenience of going through the machinations of the s 11 procedure in order to finally try and persuade the state authority that acquisition of the land should be made instead of entry pursuant to s 11. It was for the first respondent to act fairly by commencing right away under the LAA and it should be for the first respondent to persuade the state authority that the applicant's land should be acquired for the use by the first respondent of the 7.064 acres. The 'full compensation' is only for 'any disturbance, damage or disability that may be caused thereby and such compensation may include an annual payment for land used for the purpose of the posts or other equipment'. How much land can be used for installing a post? Normal lamp posts hardly take any

space. The word 'post' must be taken to mean the normal 'lamp posts' which we see everywhere. What 'disturbance, damage or disability' can be caused by installing posts? Section 16 of the Act which provides for assessment of compensation, envisages in its proviso the lopping off of 'trees' presumably for the supply lines running between the lamp posts. When repairs and maintenance work is subsequently done, s 13 of the Act again recognizes that it may be necessary to 'fell or lop trees, remove vegetation and do all other things necessary for the purpose'. This is a simple thing. No one will complain about this. They will accept compensation for such a slight intrusion and accept whatever reasonable compensation this entails.

The words 'other equipment' following the word 'posts' in s 11 of the Act cannot be construed to mean large steel structures called 'menara' or 'towers'. The interpretation of the word 'equipment' in s 2 specifies such items by way of illustration as machines, transformers, apparatus, measuring instruments, protective devices, wiring materials, accessories and appliances. This meaning cannot by any stretch of the imagination to be extended to refer to 'towers' or 'menara' as an alternative to posts. In para 1(b) of the s 11 notice shown in exh 'TYM-2' of the affidavit in support of Tang Yoot Meng affirmed on 19 February 2001, the reference to 'tiang atau menara' itself is an admission that s 11 of the Act is meant only for the erection of posts. Clearly, if 66ft on either side and 7.064 acres is to be cleared the first respondent was not intending to merely erect posts. The first respondent was intending to construct large steel towers to carry several high tension wires all along across the applicant's land. Each steel tower will easily occupy about 400 sq ft of land area. The court can take judicial notice of this because there are many towers erected in different places. The difference between lamp posts and steel towers is stark. Many such towers must be erected all along the applicant's land to carry several high tension wires. The whole of the 7.064 acres will be then occupied by the first respondent indefinitely. Consequently the land owner will be paying the quit rent and assessment and be legally the owner of the land while the first respondent will be enjoying possession. There is no power in s 11 for variation of the annual payment. If there is any increase in quit rent and assessment, which is common, it appears that the landowner must bear it. As stated earlier, no 'rent' as such is payable under s 11. It has been stated that the first respondent's licence is restricted for 21 years. It is observed that once the steel towers are laid the high tension wires will remain even if the first respondent's licence expires. It will remain there forever for all intents and purposes unless the land is acquired for some other purpose or there is some other development on that land, both of which I think are very remote possibilities owing to the nature of the utility. Further, a provision in s 11 such as 'take such other action as maybe necessary to render the installation safe and efficient' for the laying of posts cannot be construed to requiring the land owner to sacrifice the use of the strip of 66ft of land on either side of the transmission lines. Nor can it be construed to require the land owner to keep vacant and without buildings such a large strip of land. In the instant case, the land required to be

effectively surrendered comprises a land area of 7.064 acres. There is much more than mere disturbance, damage or disability caused. It is pure and simple user and occupation of the whole of 7.064 acres of the land for an undefined period. This is what I gather is intended by the s 11 notice issued by the first respondent. Therefore I am of the opinion that the first respondent has proceeded under the wrong provision of the law. The s 11 notice issued by the first respondent is ultra vires the provisions of s 11 of the Act.

The respondents have taken up some procedural points to oppose the instant application. The respondents have in their affidavits in reply challenged the procedures adopted by the applicant in coming to this court for judicial review before the land administrator has heard and adjudicated the matter. Order 53 of the Rules of High Court 1980 ('the RHC'), as amended, provides that an application for judicial review may seek any of the reliefs under para 1 of the Schedule to the Courts of Judicature Act 1964 ('the CJA') including a prayer for a declaration, either jointly or in the alternative in the same application if it relates to or is connected with the same subject matter. Order 53 r 1(4) of the RHC provides that any person who is adversely affected by the decision of any public authority shall be entitled to make the application. It is observed that when the applicant was served with the s 11 notice by the first respondent, the service had a coercive effect. If the applicant had not filed its notice of objection to the s 11 notice, the first respondent could have entered the applicant's land and erected towers (menara) and demolished all buildings 66ft on either side of the transmission lines to be laid and occupy or use that portion of the applicant's land in perpetuity. The applicant would then be entitled to claim only such compensation for the 'disturbance, damage or disability that may be caused thereby' and any appeal against such assessment of compensation can be made only to the state authority. The applicant would not be able to claim the market value of the portion of the land under the principles in the First Schedule of the LAA, including the valuable claim for compensation for the harm or injury affecting the rest of the land caused by the acquisition of a portion of the land under para 2 of the First Schedule thereto. The applicant's complaint is against the decision of the first respondent, a statutory body exercising statutory powers under s 11 and issuing a notice of intention to enter the applicant's land under s 11 to erect towers (menara), requiring buildings 66ft on either side of the transmission lines to be demolished and to clear 7.064 acres of the applicant's land for the use of the first respondent. I am of the opinion that the first respondent acted ultra vires s 11 of the Act in issuing the said s 11 notice on 23 December 2000. Section 11 of the Act does not appear to be intended for the exercise of such action to utilize private land to such an extent. I think that the first respondent wrongly exercised its discretion in exercising the statutory powers granted to it. I am fortified in my view by a number of cases decided in our courts in the past. As stated earlier, the objects of the first respondent could have been lawfully achieved by proceeding instead under s 19 of the LAA which provides entry into land in urgent cases for land to be used for public purposes.

A The Court of Appeal in *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481 upheld the quashing of the issuance by the Minister of Human Resources acting under s 20(2) of the Industrial Relations Act 1967 of a letter informing a worker that the minister had decided not to refer the matter of the worker's dismissal to the Industrial Court. The minister had not given any reason for his decision.

B In *Tan Yook Tian (G) & Anor v The District Forest Officer, Rompin, Pahang & Ors* [1987] 1 CLJ 73, Idris Yusof J held that the issuance of an order by the state forest officer under the Forest Enactment (FMS 1934) that bulldozers be surrendered to the Government was subject to the supervision by the High Court exercising its inherent jurisdiction to ensure C that the statutory powers are judicially exercised.

In a case connected with the Act, *Tan Yeong Kim lwn Tenaga Nasional Bhd* [2000] 4 AMR 4817 at p 4826, Alauddin J (as he then was) said that when the words of a statute are clear, their strict and literal meaning must be followed. He stated:

D

> Sehubungan dengan itu saya juga berpendapat bahawa s 38(1) hendaklah dibaca secara literal dan biasa atau 'in its ordinary and literal meaning'. Mahkamah Persekutuan di dalam kes *Kumpulan Kamuning Sdn Bhd v Rajoo & Ors* [1983] 1 MLJ 400 memutuskan bahawa perkataan-perkataan yang digunakan dalam peraturan 8, Employment (Termination and Lay-Off Benefits) Regulation 1980 adalah tidak kabur dan maksudnya jelas. Justera E pendekatan ketat dan literal adalah terpakai.

In *Dai-Ichi Electronics (M) Sdn Bhd v Tenaga Nasional Bhd* [1996] 4 MLJ 506, Vincent Ng J gave an injunction to restrain disconnecting electricity to a factory after Tenaga Nasional Bhd raised a bill for RM247,943.27, stating in p 511 that upon a proper construction of s 38(1) of the Act, whether the F section which ex facie allows Tenaga Nasional Bhd to disconnect electricity gave the power to 'any person employed by' Tenaga Nasional Bhd.

In *Tenaga Nasional Bhd v Dolomite Industrial Park Sdn Bhd* [2000] 2 MLJ 133, the landowner claimed damages for trespass. The Court of Appeal set aside the injunctions against Tenaga Nasional Bhd requiring G them to remove pylons which were erected in the absence of a wayleave agreement under s 56 of the Electricity Act 1949 (now repealed) made between Tenaga Nasional Bhd and the land owner. There was also no notice given by Tenaga Nasional Bhd under s 53 of the Electricity Act 1949. The adequacy of the compensation payable under s 54 and the question of whether the pylons came within the terms of s 53 was therefore not in issue. H The Court of Appeal ordered that damages for the trespass be assessed by the senior assistant registrar.

In *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 at p 187, Edgar Joseph Jr SCJ (as he then was), said that a decision susceptible to judicial review is not only open to challenge on the I ground of procedural impropriety but also on the grounds of illegality and irrationality; and in practice, this permits the court to scrutinize such decisions not only for process but also for substance.

In *Dr Benjamin George & Ors v Majlis Perbandaran Ampang Jaya and other applications* [1995] 3 MLJ 665, I had quashed a s 83 notice issued under the Street Drainage and Building Act 1974 which had the effect of ordering apartment dwellers either to repair or demolish blocks two and three of Highland Towers and the walls on the nearby hill slopes within three months from the date of the notice because there was a failure on the part of the authority to comply with the express and implied limitations on their statutory discretion. The notice was also found to be illegal and contrary to art 13 of the Constitution.

In *Osborne's Concise Law Dictionary* (8th Ed), there is a reference to an order for certiorari now being available to control non-judicial decisions. In considering the propriety of the form of relief sought, Siti Norma Yaacob JCA (as she then was) stated in *Ahmad Bashid bin Abdul Malek & Ors v Timbalan Menteri Dalam Negeri & Ors and other appeals* [1999] 3 MLJ 369 at p 374:

> Clause 2 of art 5 of the Federal Constitution speaks of 'being unlawfully detained', the very complaint that the appellant seeks to be determined before the High Court and since the court's jurisdiction conferred by Act 91 specifies more than one remedy how that complaint can be proceeded with, this gives the detainee the option to choose which of the two remedies is suited to his needs. I consider that the two remedies are not mutually exclusive. In this instance, the appellant chose the speedier and less cumbersome remedy of habeas corpus, the alternative to certiorari. For that reason, the High Court should have proceeded to hear his application on its merits and not to bother with procedural technicalities to stand in its way as by statute and the supreme law of the land, the High Court has the necessary jurisdiction and power to determine the legality or otherwise of the appellant's detention by way of habeas corpus.

In *Oriental Insurance Co Ltd & Anor v Minister of Finance* [1992] 2 MLJ 776, KC Vohrah J gave an order of certiorari to quash the order of the Customs refusing release the motor vehicle to an innocent car owner after the minister had refused an appeal. KC Vohrah J adopted the principle that judicial review is grounded on illegality, irrationality or procedural impropriety.

In *President, District Council, Batu Pahat v Lo Hong Tan* [1983] 1 MLJ 299, the former Federal Court held that the revocation by the local council of a licence to carry on business was an improper exercise of discretion.

In an appeal from New Zealand, the Privy Council in *Mercury Energy Ltd v Electricity Corp of New Zealand* [1994] 1 WLR 521 held that since the defendant, as a state enterprise, was a public body established by statute carrying on business in the interests of the public, and since its decisions made in the public interest might adversely affect the rights and liabilities of private individuals without affording them any redress, such decisions were in principle amenable to judicial review under s 4(1) of the judicature review under s 4(1) of the Judicature Amendment Act 1972 (of New Zealand) and under the common law.

In the Court of Justice of the European Communities in *Foster & Ors v British Gas PLC* [1991] 1 QB 405, in considering a case involving discriminatory law between the sexes, it was held that art 5(1) of Directive

(76/207/EEC) might be relied on in a claim for damages against a body, whatever its legal form, which had been made responsible (pursuant to a measure adopted by the state) for providing a public service under the control of the state, and had for that purpose special powers beyond those which resulted from the normal rule applicable in relations between individuals (at p 428 in para 22 of the court's judgment). The question of whether British Gas PLC was an organ of State was crucial because the said directive could only be relied on against the State, and not against an individual (at p 420 in para 2 of the opinion of the Advocate General to the European Court of Justice). The House of Lords applied the decision of the Court of Justice of the European Communities in *Foster & Ors v British Gas plc* [1991] 1 All ER 705.

My view is that by reason of the Government's privatization of certain public services aiming to improve efficiency and profitability in the public interest, the first respondent cannot act in an irresponsible manner. Their actions affect members of the public and the rights and interests of diverse private citizens. Hence, the proper exercise of the first respondent's statutory powers is subject to judicial review. It must be noted that the s 11 notice is a notice issued pursuant to a statutory power. I think the objection that an order of certiorari cannot be issued against the first respondent because it is not a public authority is without substance. Order 53(1) of the RHC facilitates applications for judicial review under para 1 of the Schedule to the CJA. I am of the view that the first respondent's submission that it is not subject to judicial review because it is not a public authority is also incorrect. The following comment is made by the first respondent's solicitors on the case of *Mercury Energy Ltd v Electricity Corp of New Zealand Ltd*. It is true that the Electricity Corp, whose decision to terminate *Mercury's* independent power provision contract was under a review in this case, was designated by a special New Zealand statute as a 'State enterprise' (where no such statute exists in Malaysia) and was exclusively owned by the government of New Zealand with ministers of the Crown bound to lay a report before Parliament on its activities (which Bhd). However, at p 526 of *Mercury's* case the Privy Council stated that:

> Judicial review involves interference by the court with a decision made by a person or body empowered by parliament or the governing law to reach that decision in the public interest.

The act or decision being impugned in the instant case is the exercise of a statutory discretion exercised by Tenaga Nasional Bhd qua statutory licensee in the public interest which adversely affects the applicant. It is not a decision by Tenaga Nasional Bhd as a commercial supplier of electricity as was the decision in *Mercury's* case, and as such the first respondent's submission is easily distinguishable. The following comments are made on the reference to *Foster's & Ors v British Gas plc* [1991] 1 All ER 705. The test in *Foster's* case on who should be in the same position as the State in respect of escaping the provisions of an unratified EC Directive was:

> ... a body, whatever its legal form, which has been made responsible, pursuant to a measure adopted by the state, for providing a public service under the

> control of the state and has for that purpose special powers beyond those which result from the normal rules applicable in relations between individuals.

It is true that the institutions of state of member countries of the European Union are more limited in what they can do than what Parliament and the state in our country can. Here there is still limited Parliamentary sovereignty within the confines of the Constitution. However, the whole crux of the decision in *Foster's* case was to decide whether it was wrong for British Gas plc to contravene the directive when the British Government had signed up to it? This is just like our doctrine of legitimate expectation'. *Foster's* case is not on what the State can do. It decides who is the State, ie what bodies should be treated as the State in determining the scope of their rights in the field of public law. Therefore, the decision is instructive and the reasoning can be applied in the instant case. I therefore hold that the decisions of the European Court of Justice is of persuasive value. The two tests stated above are similar to the comments by the Supreme Court in *OSK & Partners Sdn Bhd v Tengku Noone Aziz & Anor* [1983] 1 MLJ 179, that only an infusion of a 'public element' was necessary for a body to become subject to review. Tenaga Nasional Bhd is:

(a) established by or under the Electricity Supply (Successor Company) Act 1990;

(b) takes over the functions formerly performed by the Government body, the National Electricity Board or Lembaga Letrik Negara;

(c) controlled by the Government by the statutory licence granted to it pursuant to s 9 of the Act by the Minister of Energy. This license is subject to supervision or control by the minister and the director general under various provisions of the Act, such as the control of prices at which electricity can be sold and other activities under s 4 of the Act, and the statutory duty to supply electricity on request under s 24 of the Act.

The power to issue the s 11 notice is not a power which normal private individuals have but is:

(a) an exercise of a statutory discretion;

(b) in the public interest;

(c) which adversely affects the rights and liabilities of private individuals.

The respondents' affidavits state that there is an internal appeals procedure under the Act. It is observed that the appeals procedure under ss 11(7) and 26(2) of the Act is not a bar to judicial review if an arguable case is made out that a public body had acted ultra vires its statutory powers and unfairly and had abused its powers.

The Federal Court in *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1991] 3 MLJ 1 at p 39 had this to say:

> Speaking generally, it is right to say, that if an applicant in judicial review proceedings can demonstrate illegality, that is to say unlawful treatment, it

A would be wrong to insist that he exhaust his statutory right to appeal where one is available. Why should illegal action be not nipped in the bud by the quicker, more convenient and adequate remedy of judicial review rather appeal? It is, of course, true that convenience in this context means convenience not only for the parties but also in the public interest. (*R v Huntingdon DC, ex p Cowan* [1984] 1 WLR 501 (a licensing appeal).

B The affidavit of the first respondent states that the notice issued by the first respondent is not a quasi judicial decision which can be reviewed. I am of the view that the first respondent performs a public function and has to exercise its discretion by acting judicially.

In *Petaling Tin Bhd v Lee Kian Chan & Ors* [1994] 1 MLJ 657, when C considering a ruling of the Panel of Take Overs and Mergers on the effect of a public censure and commencing on exercise of powers by the non-statutory English Panel, the Supreme Court had this to say at p 671:

> Unquestionably, the significance of *Datafin*, is that it marks a further extension of the boundaries of the court's jurisdiction in cases of judicial review which springs from a desire to avoid the exercise of extensive power D which is not subject to the supervision of the courts.
>
> If that be the position of the English panel which is a non-statutory, self-regulatory body without visible means of legal support, then the position in this country, must be a *fortiori*, since the Malaysian Code, unlike the London Code, is promulgated by Parliament and not therefore, as the judge thought, a mere gentleman's agreement.
>
> E In certain circumstances, therefore, and provided always that the impugned act or decision of the Panel is not caught by the private clause contained in s 179(8) of the Act, the Panel can be subject to judicial review since it performs a public function, the source of its power is statutory and it has a duty to act judicially.

F In *Datuk Syed Kechik bin Syed Mohamed v Government of Malaysia & Anor* [1979] 2 MLJ 101 at p 107B, Lee Hun Hoe CJ Borneo stated:

> The prevailing view seems to be that the court's jurisdiction to make a declaratory order is unlimited subject only to its own discretion.

The Court of Appeal in *Datuk Bandar Kuala Lumpur v Zain Azahari bin* G *Zainal Abidin* [1997] 2 MLJ 17 in considering a development order issued by the appellant local authority held at pp 31–32, 35 that:

> The present appellant being a public decision maker, upon whom a power or discretion is vested by Parliament is akin to a trustee, who is therefore under an obligation to exercise, for a proper purpose, his discretion reasonably and H in accordance with the terms of the relevant statute that confers the power or discretion. It does not matter that the language which confers the power or discretion is wide.
>
> Where the exercise of a discretion is challenged on grounds of *ultra vires*, ie illegality or unreasonableness, the court is not confined merely to the decision making process, but may examine the merits of the decision itself.
>
> I ...
>
> However, since the appellant makes the determination on issues of planning approval, it is for him, when challenged, to set out, by way of

affidavit explaining the circumstances that affected his decision, the matters he took into account when arriving at his decision so as to satisfy the court that he acted in accordance with the law. Although he cannot be compelled to provide an affidavit, the court must be left to decide the case on such admissible evidence as is made available to it. The appellant in this case has not filed an affidavit nor is there any justification for his failure to do so.

In *Judicial Review: Law and Procedure* by Richard Gordon QC (Sweet & Maxwell 1996) at pp 59–60, paras 3–007 & 3–008, the 'Atkin dictum' is quoted and thereafter the learned author comments on it. The 'Atkin dictum' in *R v Electricity Commissioners, ex p London Electricity Joint Committee Co* [1920] 1 KB 171 at p 205 reads:

Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdiction of the King's Bench Division exercised in these writs.

And the author's comments are as follows:

On this basis certiorari is, clearly, available to quash decisions of inferior courts. What other public bodies, it may be asked, have a duty to act judicially?

Fortunately, the *Electricity* case dictum has, like so much else in modern administrative law, been subject to judicial erosion. Although the literal construction is that there is an additional requirement to act judicially, it seems to be accepted that this is a misreading of what Atkin LJ actually meant. The 'judicial' element is to be inferred from the nature of the power exercised and extends to a broad range of administrative decision making. The widening of the dictum in this way ensures that certiorari has been granted in many different situations.

In de Smith, Woolf & Jowell on *Judicial Review of Administrative Action* (5th Ed) at pp 168–169, para 3–026 states:

There is much to commend a function based approach to determining the scope of judicial review. Not only does it enable the courts to articulate more explicitly the modern constitutional role of judicial review — the common law control of public functions — but it may provide redress for grievance where no other remedy exists. As it is through the principles of judicial review that the rule of law and other constitutional principles are given practical effect, the supervisory jurisdiction of the High Court should ensure that bodies, whether nominally public or private, when performing public functions, comply with the law and achieve acceptable standards of administration.

The former Federal Court has explained and applied the extended meaning of the 'Atkin dictum' in *OSK & Partners Sdn Bhd v Tengku Noone Aziz & Anor* at p 183 to Abdoolcader FCJ (as he then was) in delivering the judgment of the Federal Court said:

There has been some confusion on the purpose and import of the words 'the duty to act judicially' which however has since been put right by a reinterpretation thereof by Lord Reid in *Ridge v Baldwin* [1964] AC 40 (at pp 74–79) where he explained in effect that in the correct analysis this phrase was simply a corollary and the automatic consequence of the power 'to

A determine questions affecting the rights of subjects' and that where there is any such power there must be the duty to act judicially. Lord Hodson also in that case (at p 130) criticized the fallacy of saying that 'the giver of the decision is acting in an executive or administrative capacity as if that was the antithesis of a judicial capacity'. The House of Lords made it clear in that case that if a tribunal is able to affect rights, that in itself shows that the courts can supervise the tribunal through the prerogative orders and it is not necessary to employ- terms such as quasi-judicial. Even as far back as 1952 the Divisional Court in England was able to say in *R v Manchester Legal Aid Committee; ex p RA Bernad & Co Ltd* (at pp 428–429):

> 'The true view, as it seems to us, is that the duty to act judicially may arise in widely different circumstances which it would be impossible, and, indeed, inadvisable, to attempt to define exhaustively.'

In *R v London Borough of Hillingdo, ex p Royco Homes Ltd* [1974] 1 All ER 643, on an application to bring up and quash a planning permission in which four conditions were alleged to be ultra vires the planning authority, Lord Widgery CJ had this to say:

> In view of that clear dictum from Atkin LJ it is surprising that so little time has been made of the prerogative orders in this particular field, and I think that counsel for the planning authority may have put his finger on the explanation when he referred to the fact that Atkin LJ's dictum required not only that the body to whom certiorari was to go had legal authority to determine questions affecting the rights of subjects, but also required that that body should have the duty to act judicially, a phrase which is rather less clear and indeed very difficult of definition. Accordingly it may be that previous efforts to use certiorari in this field have been deterred by Atkin LJ's reference to it being necessary for the body affected to have the duty to act judicially. If that is so, that reason for reticence on the part of applicants was, I think, put an end to in the House of Lords in *Ridge v Baldwin*. It is a case the facts of which are very far from the present and indeed have nothing to do with planning at all. But in the course of his speech Lord Reid made reference to that oft-quoted dictum of Atkin LJ and pointed out that the additional requirement of the body being under a duty to act judicially was not supported by authority. Accordingly it seems to me now that that obstacle, if obstacle it were, has been cleared away and I can see no reason for this court holding otherwise than that there is power in appropriate cases for the use of the prerogative orders to control the activity of a local planning authority.

The first respondent claims that on the facts and on the law, the first respondent's s 11 notice was issued in accordance with the provisions of s 11 of the Act. I am of the view that on a proper interpretation of the words of s 11 of the Act, the s 11 notice issued on 23 December 2000 is at variance with the words of the section. There are a number of judicial pronouncements on what we can read into the words of an Act of Parliament and what we cannot. In interpreting the provisions of the Copyright Act 1969, Abdoolcader FCJ sitting as Supreme Court judge in *Foo Loke Ying & Anor v Television Broadcasts Ltd & Ors* [1985] 2 MLJ 35, at p 43 stated:

> We are of the view that the provisions of the Act under consideration before us call for a purposive and literal construction which is one which follows the

literal meaning of the enactment where that meaning is in accordance with the legislative purpose and applies where the literal meaning is clear and reflects the purposes of the enactment.

In interpreting the then s 9(b) of the Societies Act 1966, the above dicta was applied by the Supreme Court in *Vengadasalam v Khor Soon Weng & Ors* [1985] 2 MLJ 449, and at p 450 Abdoolcader FCJ stated:

> We can see no justification for extending the ambit of s 9(b) of the Act and any exercitation purporting to fill in textual details in a statute on policy considerations would be, to reiterate what was said in *Foo Loke Ying*, no less than an unwarranted judicial transgression into the legislative area and an attempt to obturate a statutory hiatus (if indeed there is any but we see none in any even in this case) which is not a curial function.
>
> In *Wong Pot Keng v Hj Zainal Abidin Putih & Anor* [1990] 2 CLJ 174, Mohd Azmi CJ said at p 180E:
>
> > 'Where there is no ambiguity in the legislation, the court has no other duty but to adopt the literal and strict construction rule even though the result may appear to produce an unpopular result.'

It may be argued that the expression 'and other equipment' in s 11 after 'such posts' may cover 'towers' and that the words 'may take any other action' in s 11 may cover the requirement to keep 66ft of land vacant on either side of the transmission lines for the first respondent's purpose. In *Methuen-Campbell v Walters* [1979] 1 All ER 606 at p 620, Lord Justice Buckley states:

> In a statute, if the legislature uses a technical term, it should in my opinion be taken to use it in its technical sense unless it is plain that something else was intended. I agree with the view expressed by Golf LJ that in an Act such as the Leasehold Reform Act 1967, which, although it is not a confiscatory Act is certainly a disproprietory Act. If there is any doubt as to the way in which language should be construed, it should be construed in favour of the party who is to be dispropriated rather than otherwise.

This principle that property rights cannot be easily taken away is an old principle. In *Scales v Pickering* (1828) 130 All ER 840 at p 841, Best CJ states:

> They who enter in such cases (ie upon private land must clearly show their authority; and if the words of the statute on which they rely be ambiguous, every presumption is to be made against the company and in favour of private property.

In considering s 124(1)(b) of the National Land Code in *United Malayan Banking Corp Bhd v Syarikat Perumahan Luas Sdn Bhd (No 2)* [1988] 3 MLJ 352 at p 355 Edgar Joseph Jr FCJ (as he then was) states:

> In considering this question, I have kept in the forefront of my mind, on the one hand, the well known canon of construction enunciated by the Federal Court in *Chin Choy & Ors v Collector of Stamp Duties* [1979] 1 MLJ 69:
>
> > '... that the meaning and intentions of a statute must be collected from the plain and unambiguous expression sued therein rather than from any notions which may be entertained by the court as to what is just and expedient...

> However unjust, arbitrary or inconvenient the meaning conveyed may be, it must receive its full effect. When once the meaning is plain, it is not the province of a court to scan its wisdom or its policy. Its duty is not to make the law reasonable, but to expound it as it stands, according to the real sense of the words.'
>
> and, on the other hand, the rule that statutes which encroach on the rights of a subject, whether as regards person or property are subject to a strict construction in the same way as penal statutes.

It is my judgment that on a proper interpretation of art 13(2) of the Constitution, the provisions of ss 11 and 16 of the Act are not intended to cover the compulsory acquisition or use of land. The provisions are only intended for the purpose of entry into private land to erect posts and provisions for payment of compensation for such a specified incursion. It is not intended for the construction of towers, removal of buildings 66ft either side of the transmission lines or any such serious large scale use and occupation of private land and for the deprivation of property rights of land owners to such an extent. In *Adong bin Kuwau & Ors v Kerajaan Negeri Johor* [1997] 1 MLJ 418, Mokhtar Sidin HMR (as he then was) sitting as a High Court judge, gave compensation to aborigines to restart life elsewhere where s 11 of the Aboriginal Peoples Act 1954 guaranteeing adequate compensation to aborigines for land used by them to plant rubber or fruit trees was alienated did not apply. This decision was upheld by the Court of Appeal.

It is my judgment that the s 11 notice issued by the first respondent on 23 December 2000 is ultra vires s 11 of the Act because the notice makes demands and requires things to be done which are not specifically and clearly provided in s 11 of the Act. The notice is therefore illegal and would be considered void ab initio.

The first respondent's solicitors submit that there is no 'decision' here to be quashed. There is however an 'act' in the exercise of a statutory power. This is also reviewable. The Atkin dictum specifically says 'any act or decision' and the several cases cited previously on behalf of the applicant where various notices have been quashed or reviewed are sufficient authority to deal with this objection. The decision by the first respondent to issue the s 11 notice and the actual s 11 notice itself is effectively one and the same thing, and is reviewable by reason of it being done in the exercise of a statutory discretion infused with a public element that impinges on the private property rights of the applicant. The first respondent's other complaint is that the applicant has prematurely come to court as the decision to issue the notice and the notice itself does not affect the applicant's rights per se. It is argued that what will actually affect the applicant's property rights is the subsequent decision of the land administrator and the state authority on appeal. In support, the Australian High Court decision of *Hot Holding's Pty Ltd v Creasy & Ors* (1996) 134 ALR 469 is cited. The solicitors for the first respondent have quoted the decision of the Australian High Court at pp 474–475, line 8 of the report. If one were to read on from line 9 of p 475, the majority decision of the High Court states:

> This formulation encompasses two broadly typical situations where the requirement of legal effect is in issue:
>
> (1) where the decision under challenge is the ultimate decision in the decision making process and the question is whether the ultimate decision sufficiently 'affects rights' in a legal sense;
>
> (2) where the ultimate decision to be made undoubtedly affects legal rights but the question is a decision made at a preliminary or recommendatory stage of the decision-making process sufficiently 'determines' or is connected with the decision.

Later, at pp 477–478, it is stated:

> Importantly, his Lordship recognizes that 'the remedy is available even though the decision is merely a step as a result of which legally enforceable rights may be affected. Diplock LJ agreed:
>
> > 'It is plain on the authorities that the tribunal need not be one whose determinations give rise directly to any legally enforceable right or liability. Its determination may be subject to certiorari notwithstanding that it is merely one step in a process which may have the result of altering the legal rights or liabilities of a person to whom it relates. It is not even essential that the determination must have that result, for there may be some subsequent condition to be satisfied before the determination can have any effect upon such legal rights or liabilities. That subsequent condition may be a later determination by another tribunal.'

The first respondent is relying on *Teh Cheng Poh v PP* [1979] 1 MLJ 50 to say that the Act is a special statutory provision whereas the LAA is a general one. I think such a distinction is drawn only when there is an ambiguity. There is none in this case. Section 11 of the Act does not permit construction of steel towers. The first respondent must know this. It is not for the first respondent to say that there is an appeal provision if the land owner does not agree. The first respondent's concept of 'way leave' is not consistent with s 15 of the Act which requires the land owner's agreement for the purpose of carrying a supply line across the land. There is no such agreement here. The first respondent's reference to the term 'way leave' in relation to the applicant's land through which the towers and transmission lines are to be laid is altogether inappropriate. With reference to the first respondent's contention that words in a statute cannot be disregarded as mere surplusage, I am of the view that the applicant is not contending that s 11 of the Act or any words in it must be disregarded. The applicant is asking that the words be given their proper effect. The applicant is asking, on the contrary, that words should not be read into s 11 by inferring that the remedial provisions in s 11(8) of the Act show that the intention to acquire land is also covered by s 11(1) of the Act. I think the references to *Robert John Reeves v Menteri Sumber Manusia Malaysia* [2000] 1 MLJ 107 and the dictum of Lord Diplock in *Secretary of State for Education & Science v Tameside Metropolitan Borough Council* [1976] 3 All ER 769 on the discretion to choose is not appropriate. Section 11 of the Act does not allow what the first respondent wants to do. Section 11 of the Act specifically provides for the entry to erect posts. It does not permit the effective acquisition of land per se. By having chosen s 11 of the Act, the first respondent has acted

against the public interest. The applicant has filed an objection to it. If the first respondent had proceeded under s 19 of the LAA, then the applicant cannot object. This is a case of an incorrect application of the law rather than a choice. The first respondent had no choice. The first respondent must proceed according to the law. The fact that there are no buildings currently on the land does not permit the first respondent to use s 11 of the Act to utilize all that land. Vacant land with potential for development is a factor to be taken into consideration in land acquisition cases. In the instant case, the applicant says that the s 11 notice will cause the applicant to lose profits from the proposed construction of a five storey walk up medium low cost apartments and in addition, 88 double storey houses. Furthermore, the proposed 'acquisition' of land by the first respondent will cause injury or harm to the remainder of the applicant's land because new plans will have to be drawn once again and submitted for approval and the whole development plan will be stalled by the administrative procedures for getting planning approval and approval for layout plans subsequently. There is no provision in the Act for the giving of such type of compensation even if the meaning of s 11 is stretched to accommodate construction of large steel structures known as menara or towers or pylons to support several high tension wires and prohibition against building on 7.064 acres of land and clearance of such a large area of land for such purpose.

The dicta in *Government of Malaysia & Anor v Jagdis Singh* [1987] 2 MLJ 185 by the Supreme Court that certiorari will only be used in very exceptional circumstances when there is an appeal procedure does not apply in our case. The applicant is not applying for an order of certiorari after a hearing before a tribunal. The applicant is applying for an order of certiorari promptly upon issuance of the s 11 notice to nip in the bud the wrong doing, ie the wrongful exercise of a statutory power ultra vires the powers given in a statute. The eviction notices from the land administrator to squatters in *Lim Kui Siam & Ors v Pentadbir Tanah, Daerah Kluang* Originating Motion No 25–25 of 1994 (High Court, Muar), cannot be compared to the improper exercise ultra vires of statutory powers as in our case. The decision in *Bencon Development Sdn Bhd v Majlis Perbandaran Pulau Pinang & Ors* [1999] 2 MLJ 385 is not applicable to our case because in that case, the Town and Country Planning Act 1976 gave a discretion to the approving authority to impose conditions when it granted planning approval. When it did it require an existing bridge to be widened. That was a decision authorized by law and not unreasonable, taking into consideration that development of land will entail greater use of the bridge. In our case, the laying of the transmission lines across the applicant's land is not occasioned as a result of the applicant's application for planning approval. It is independent of it. I also think the first respondent's submission on the decision in *Waverley Borough Council v Hildern & Ors* must also be considered on the peculiar facts of that case. That case was a civil suit brought by a local authority for injunctions to ensure that an enforcement notice issued after a final planning decision was complied with, no appeal or review of that final decision having been made. That is not at all similar to the facts in the case here.

With regard to the first respondent's submission as to whether the Act was unconstitutional, I am of the opinion that the applicant did not submit that s 11 of the Act was unconstitutional. The applicant's submission is that if the first respondent's s 11 notice was permitted then s 11 of the Act would not satisfy the provisions of art 13 of the Constitution. Article 13(2) of the Constitution requires that no law shall provide for the compulsory acquisition or use of property without adequate compensation. The LAA and the common law on this point require the market value of land to be paid to the owner as the adequate compensation. There is no specific provision in the Act requiring the market value of the land to be used by the land administrator as a criteria for the assessment of compensation to be paid to the land owner. The term 'full compensation' in s 11(1) of the Act is limited by the words following it. It is limited to what is considered 'disturbance, damage or disability that may be caused thereby'. The word 'thereby' refers to the entry to 'lay, place or carry on such posts'. The provisions for 'full compensation' under s 11 of the Act appear to be restricted to full compensation for the nuisance caused rather than for the land to be used permanently. The provisions are clearly inconsistent with art 13(2) of the Constitution in the context of the activities proposed in the first respondent's s 11 notice. My view is that if the contentious s 11 notice is considered under s 11 of the Act confusion will arise on what compensation will be payable to the land owner in the absence of the correct principles set out for the assessment of compensation for the permanent use of land or acquisition of land. I have stated earlier that the wrong provisions of the law has been used by the first respondent. Section 11 of the Act may be more convenient for the first respondent but for the purpose that the first respondent has in mind s 11 is inappropriate. In *Government of Malaysia & Anor v Selangor Pilot Association* [1977] 1 MLJ 133, the Privy Council found that the Selangor Pilots Association was not deprived of 'property' when they lost their rights to carry on pilotage business as a monopoly in Port Klang. That case is not applicable here. The applicant will lose the use of their land under the s 11 notice. A notice under s 11 of the Act can only be issued by a licensee. The first respondent as a licensee was exercising a statutory power when it issued a notice under s 11 of the Act. Surely the exercise of a statutory power by the first respondent is subject to review by the court under O 53 of the RHC. By s 3 of the Electricity Supply (Successor Company) Act 1990, the first respondent acquired all property, rights, and liabilities to which the National Electricity Board established under the Electricity Act 1949 was entitled or subject to. There is no doubt that the National Electricity Board was a public authority. The first respondent as its successor cannot take its responsibilities and statutory powers lightly. Article 13(1) of the Constitution is not in question. The applicant is not challenging the laying of towers and transmission lines on its land. It is only asking that it be done according to the correct law, ie the LAA. The s 11 notice is not issued in accordance with the law. I think the applicant is not applying to strike down s 11 of the Act. In interpreting s 17A of the Interpretation Acts 1948 and 1967, providing for a purposive interpretation to give effect to the purpose

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or object for which the Act was enacted, I am of the view that this must be done within reasonable limits.

When there is the LAA, which is the appropriate law, there is no reason to ask the courts to extend the provisions of the Act to accommodate the s 11 notice to carry out work not provided for in s 11 of the Act. I therefore grant order in terms of (1)(a) of the applicant's application in encl (8) with costs.

Application allowed.

Reported by Peter Ling